IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3977 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

G C SHASTRI

Versus

STATE OF GUJARAT

Appearance:

MR GIRISH PATEL for Petitioner

GOVERNMENT PLEADER for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 09/02/2001

C.A.V. JUDGEMENT

Heard the learned counsel for the parties.

2. The petitioner in this petition under Article 226 of the Constitution is praying for issuance of a writ of mandamus or any other appropriate writ order or direction

declaring the order of termination of the petitioner from services as absolutely illegal, arbitrary, irrational, bad in law and quashing and setting aside the same. Second prayer has been made to restrain the respondents, their agents and servants from implementing, acting or enforcing the impugned order of termination of services of the petitioner. Third prayer has been made to allow the petitioner to work on the same post on which he was working prior to the date of the order of termination as if the impugned order of termination has not been issued at all and allowing him salary, allowances and other benefits to which he is entitled to. Prayer has also been made for interim relief.

3. The matter was placed in Court on 20th June, 1989 on which date, notice was issued to the respondents returnable on 29th June, 1989. Interim relief restraining the respondents from enforcing the alleged order of termination of services dated 16th June, 1989 as referred to in para-11 of the petition upto 30th June, 1989 was granted. This interim relief was ordered to be continued from time to time. On 20th December, 1989, this court ordered:

> "Petitioner would file proper representation for permitting him to appear in the departmental examination with an unconditional apology for not appearing in the departmental examination under the mistaken belief that he was not required to appear in the examination. Ad-interim relief to continue till further orders."

4. On 19th February, 1992, this Court passed the following order:

> The learned counsel for the petitioner states that the petitioner ha already made an application on 29th January, 1990 for allowing him to appear at the Pre-Service Training Examination as was earlier directed by this Court on 20th December, 1989. However, the Respondent State has not taken any action on that application. Respondent No.1 is directed to consider the said application and take a decision on it within three weeks from today. S.O. to 23rd March, 1992.

5. On 10th July, 1992, this petition was admitted. Draft amendment has been filed by the petitioner but it is not granted so far and at no point of time after 12th December, 1989 this has been pressed. This matter was

placed on Board from time to time but at no stage, this draft amendment has been pressed.

6. In para-11 of the special civil application, the petitioner averred that he is indisposed and has not been attending the office since 16th June, 1989. However, he has reliably learned that an order terminating his services has been issued by RTO, Ahmedabad and posted on 16th June, 1989, but so far he has not received the same.

7. This petition is presented by the petitioner in this Court on 19th June, 1989. The petitioner has not produced on the record any medical certificate or any other material to show that he applied for leave and leave has been sanctioned. The petitioner has not produced on the record of this special civil application, the order of the respondents under which his services were terminated. It is a clear case where the petitioner knew of the order of the termination of the services and he has deliberately avoided the service of the same and rightly it was posted on 16th June, 1989. The respondents with reference to the averments made by the petitioner in para-11 of the special civil application stated that the respondent No.2 has passed the order on 15th June, 1989 terminating the services of the petitioner. The petitioner with a view to avoid the service of the same, remained on unauthorised leave on or after 16th June, 1989. Then it is stated that he was served with the termination order and he is continued in services under the injunction order of this court by making misleading statement and concealing the issue.

8. Rejoinder to the reply has been filed in which it is stated that he worked as a Clerk till 15th June, 1989, On 16th June, 1989, his daughter was not well and for the purpose of treatment, it was necessary for him to remain at home and it was not possible for him to go to the office and attend the duties and, therefore, he was on leave and he sent the leave report from 16th June, 1989 to 20th June, 1989 by post. In the meanwhile, he apprehended termination and approached to the Court on 19th June, 1989. From the averments made in the main petition and rejoinder by the petitioner and in reply by the respondents, it is a clear case where on 15th June, 1989 this order of termination was to be served upon the petitioner but he has avoided the receipt thereof. He refused to accept the same and the respondents have send the same to him by registered post A.D.. From the averments made in para 11, it is clear that he knew of the order of termination and the fact that the same has been posted to him on 16th June, 1989.

In these facts, it is to be accepted what it is stated by the respondents to be true that this order has been passed on 15th June, 1989 and the petitioner refused to accept the same and on the very next date, he proceeded on leave and then filed this petition and obtained the interim relief. Thereafter, till date, the petitioner has not produced the copy of that order on record. The petitioner has not come up with clean hands before this Court. In rejoinder, he made false statement that he is having apprehension of termination, he approached to this Court. This order of termination of services has been passed, which is clearly borne out from para-11 of the petition. This conduct of the petitioner itself is sufficient for dismissal of this petition. The petitioner has not come up with clean hands before this Court, he has not candidly and fairly disclosed of the material facts and to get stay order from this court, he has not accepted this order deliberately.

9. Otherwise also, when the order of termination of services has not been produced on record, how it can be declared to be illegal, arbitrary, irrational, bad in law and no question does arise of quashing and setting aside the same. Unless this order is quashed and set aside which is only possible when the same is produced no record, how any relief could have been granted to the petitioner by way of interim relief or otherwise. The Court cannot quash and set aside the order unless the same is produced on the record. Reference in this respect may have to the decision of the Apex Court in the case of Surinder Singh vs. Central Government & Ors. reported in 1986 (4) SCC 667. This is another ground on which this petition deserves to be dismissed.

10. Learned counsel for the petitioner contended that during the pendency of this writ petition, the petitioner prayed for voluntary retirement and which has been granted w.e.f. 31-1-1997. He made a submission that a sympathetic view may be taken in this matter and as the petitioner has already served to the Department for about 23 years till 31-1-1997, the respondents be directed to give him pension and other retirementary benefits. The services of the petitioner were brought to an end by an order dated 15th June, 1989 and on that day, he was not having the qualifying services to make him eligible for praying for voluntary retirement and consequential obligation of the respondents to accept the same. His services continued beyond 15th June, 1989 under the Court's order. These services have been taken into consideration by the respondent and would have been accepted voluntary retirement application but that order

is always subject to the final outcome of this petition. Learned counsel for the petitioner made contention on merits that the services of the petitioner could not have been terminated for nonpassing of the Pre-Service Training Examination as those rules prescribing to pass the examination are not applicable to the petitioner who has been appointed under a scheme of half a million job program for educated unemployed.

11. Learned counsel for the respondents, on the other hand, contended that the petitioner has been appointed as a Clerk and he has to pass the examination aforesaid under the Gujarat Non Secretariat Clerks/Typist (Training and Examination) Rules,1970, which Rules nowhere grant exemption of passing of this examination to those persons who have been appointed as Clerk though earlier to their appointment as Clerk they were given employment under the scheme aforesaid. It has next been contended that the appointments of Clerk are regulated under the Gujarat Non-Secretariat Clerks, Clerk-Typists (Direct Recruitment Procedure) Rules, 1970 and this appointment of the petitioner has been made under these rules and it was subject to the condition of passing of the examination aforesaid.

12. I have given my thoughtful consideration to these submissions made by the learned counsel for the parties.

13. From the document which is there on the record as annexure `C' at page-17, I find that the Government of India has announced a scheme under the caption "Half a Million Jobs Program - Employment of Educated Unemployed. Under the scheme, the State Government has to arrange the training of the candidates with assurance to the Government of India that after completion of their training, the trainees will be provided suitable employment under Government and State Government has accordingly trained 1133 candidates under different subjects. This document, annexure `C' is the letter of Deputy Secretary, General Administration Department, Sachivalaya, Gandhinagar dated 12th September, 1974 addressed to all Collectors/Convenors of Departmental Selection Committee. It is further stated in this order that 51 candidates holding Degrees/Diplomas in Mechanical/Electrical Engineering should be absorbed by the Public Works Department in all available future vacancies. Likewise, 11 candidates holding Degree/ Post Graduate Degree in Agriculture will be absorbed by Agriculture, Forests and Cooperation Department in all available future vacancies. So far as rest of

candidates numbering 1071 they are proposed to be absorbed in vacancies for which they have been trained. It is to be mentioned here that the petitioner was taken as Apprentice under that scheme for wireman training and he has to be paid a stipend of Rs.100/-p.m. during training. This is clearly borne out from para-4 of the special civil application. So under that scheme of Central Government, these persons are to be taken only as Apprentice and it is no more now res integra that Apprentices have to face selection for being appointed in regular appointment. Rules, 1970, provides for recruitment to the cadre of Clerks but no such provision is there that apprentices are to be given preferential claim in the appointment. The Deputy Secretary in the letter aforesaid stated that those persons are to be absorbed in the vacancies for which they have been trained but simultaneously it has been decided that when they apply for the posts of Clerks, Clerk-Typists or Typists advertised under the centralised recruitment scheme, they should be considered in preference to other candidates if necessary in relaxation of the prescribed upper age limit and the percentage of marks at SSC examination or its equivalent examination even if the last date of submission of the applications have already expired. How this can be ordered by a Deputy Secretary and worse part is that how the appointing authority has taken it to be a mandate from the State Government to the extent where the State Rules nowhere provides such relaxation to be given as well as preference to be given to this class of persons. Be that as it may. This is not the point to be considered but it is an admitted fact that under the centralised recruitment scheme, which is provided under the Recruitment Rules, 1970, the petitioner has been given appointment as a Clerk and is secondly subject to the condition of passing by him the Pre-Service Training Examination as provided under the Gujarat Non-Secretariat Clerks, Clerk-typists and Typists (Training and Examination) Rules, 1970. As the petitioner has been posted and transferred to the Department he has to pass, in addition to the aforesaid examination, another department examination under the provisions of Gujarat Motor Vehicles Department (Conditions of Services relating to Junior Clerk) Examination. Rule 8(2) of Rules, 1970 provides that where a candidate fails to pass the Post-Training Examination within prescribed chances, his services are to be terminated. It is also provided under the Rules that if a candidate has not availed of the chances provided to him, it will be taken to be a case where the chances have been availed of. It is not in dispute that the petitioner has not passed this examination within

prescribed attempt and respondents have not committed any illegality whatsoever in terminating the services of the petitioner. The termination of services of the petitioner is perfectly legal and justified and no interference is called for of this court in the matter. The petitioner has taken the benefit of the interim order possibly knowing that ultimately he may not succeed in the petition on merits. He applied for the voluntary retirement and that has been granted but his services which he rendered under the court's order cannot be counted for the qualifying services and if this period is minus then he was not entitled for voluntary retirement. It is no more res integra that on dismissal of the petition, the order granting temporary relief or stay order merges in the final order and no benefit of the services rendered by the petitioner under the interim order can be given to him. In case on sympathies if any benefit is given to the petitioner then what this court will do to perpetuate illegality and confer the benefit to the petitioner otherwise for which he was not legally entitled.

14. Leaving apart the question that under the Rules of Recruitment and Departmental Examination, no amendment has been made and by the order of Deputy Secretary dated 12th September, 1974, annexure `C', nothing can be read or taken to be incorporated in the Rules but still if we take everything in favour of the petitioner, the relaxation has been provided to the extent only that while considering the candidature of such class of candidates who applied for the post of Clerk under the centralised recruitment scheme, they have to be given preference by the Selection Committee and further some relaxation permissible of the prescribed upper age limited, percentage of marks of S.S.C. examination and last date of submission of applications. No relaxation has been provided for any other purpose. Learned counsel for the petitioner has failed to show any provision from the Rules, both of Recruitment as well as Departmental Examination, which granted exemption to such class of persons from passing of the examination. I find sufficient merits that the petitioner tried to create confusion before this Court by stating that for nonpassing of this examination, his grade increment could have been withheld. The petitioner, as stated earlier, has to pass another departmental examination as provided under the Gujarat Motor Vehicles Department (Condition of Service relating to Junior Clerks) Examination as he was appointed in the said Department and for nonpassing of the same, his grade increment could have been withheld but that is not the case with the examination provided

under the Rules, 1970. For nonpassing of that examination under Rules, 1970, within prescribed attempt, his services are liable to be terminated and rightly in this case his services have been terminated.

15. In the result, this special civil application fails and the same is dismissed. Rule discharged. Interim relief which has been granted stands vacated. The petitioner is directed to pay Rs.1200/- as costs of this petition to the respondent No.1.

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zgs/-